FILED
U.S. Bankruptcy Appellate Panel of the Tenth Circuit

April 22, 1998

Barbara A. Schermerhorn Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE HAROLD FREDERICK BUCK, also known as Harry Buck, also known as Harry F. Buck, doing business as Buck Law Offices, Debtor.	BAP No. WY-98-004
JACK I. AUSTIN, P.C., Plaintiff—Appellant, v. HAROLD FREDERICK BUCK, Defendant—Appellee.	Bankr. No. 94-20409 Adv. No. 94-2032 Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of Wyoming

Before PUSATERI, CLARK, and ROBINSON, Bankruptcy Judges.

CLARK, Bankruptcy Judge.

After examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. Bankr. P. 8012; 10th Cir. BAP L.R. 8012-1(a). The case is therefore ordered submitted without oral argument.

Jack I. Austin ("Austin") appeals a judgment of the United States

* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

Bankruptcy Court for the District of Wyoming overruling his objection to the discharge of Harold F. Buck, chapter 7 debtor ("Debtor"), under 11 U.S.C. § 727(a)(4)(A), and granting the Debtor a discharge under section 727(a). For the reasons set forth below, we AFFIRM the bankruptcy court's judgment.

I. Background

The Debtor is an attorney who was doing business as Buck Law Offices in Wyoming. He also had several other business interests. Austin is an unsecured creditor of the Debtor, with a claim for unpaid accounting services.

Austin filed a complaint against the Debtor objecting to the Debtor's discharge under, in relevant part, section 727(a)(4)(A), alleging that the Debtor made several false oaths in his bankruptcy pleadings. Austin maintained that the Debtor failed to disclose certain significant assets and prepetition transactions. In particular, Austin argued that the Debtor failed to disclose that:

(1) he transferred in excess of $83,000 within one year of the filing of his bankruptcy case;

(2) he made a payment to his mother in the amount of approximately $23,500 several weeks before he filed bankruptcy;

(3) he was party to three different lawsuits during the year preceding his bankruptcy case;

(4) he owned a painting valued in excess of $10,000;

(5) his law partner held significant funds belonging to the Debtor in his account;

(6) he held funds for third parties; and

(7) he had numerous accounts receivable, contingent fees and executory contracts as of the date that he filed chapter 7.

Austin also noted that the Debtor significantly underestimated the value of his automobile at $4,500, when its worth was at least $12,000.

After a trial on Austin's complaint, the bankruptcy court entered a Decision on Complaint Objecting to Discharge ("Decision"). In its Decision, the bankruptcy court found that the Debtor did not disclose any of the above

transactions or assets in his bankruptcy pleadings, that his automobile was undervalued, and that he had not amended his pleadings to reflect these items since his bankruptcy case had been commenced. The bankruptcy court also stated that these assets or transactions were discovered primarily as a result of questions of the trustee or creditors at the Debtor's initial meeting of creditors, and that the omissions were "material." Although clearly contemptuous of the Debtor's initial lack of candor and cavalier attitude regarding bankruptcy disclosure, the bankruptcy court concluded that its "overall impression" was that the Debtor's "material omissions and mischaracterizations" were not "made willfully with fraudulent intent." Decision at pp. 21-22, 24 & 25 (relying on Job v. Calder (In re Calder), 907 F.2d 953, 956 (10th Cir. 1990)). The bankruptcy court stated that:

> [I]n the final analysis, the court cannot find that Mr. Buck intended to defraud the creditors of his estate or the trustee within the meaning of § 727(a)(4)(A). There is a standard of disclosure set forth in the Calder case at which point the discharge must be denied. Mr. Buck's misstatements and omissions, although questionable, were not intended to hide assets from the trustee and do not reach that level. Despite the court's misgivings with the debtor's conduct, the court concludes that the debtor should be discharged and given a fresh start.

Decision at p. 26. Based on its findings of fact and conclusions of law set forth in the Decision, the bankruptcy court entered a judgment in which it overruled Austin's objection to the Debtor's discharge, and granted the Debtor a discharge under section 727(a).

Austin timely filed a notice of appeal from the bankruptcy court's final judgment in the United States District Court for the District of Wyoming. *See* 28 U.S.C. § 158(a)(1). Based on an agreement of the parties and an order of the Wyoming District Court, this appeal was then transferred to this Court for disposition. *See* id. at § 158(b) & (c)(1).

II. Discussion

Section 727(a) of the Bankruptcy Code states, in relevant part, that:

(a) The court shall grant the debtor a discharge, unless--

. . .

(4) the debtor knowingly and fraudulently, in or in connection with the case--

(A) made a false oath or account[.]

11 U.S.C. § 727(a)(4)(A). The Tenth Circuit has stated that "[t]o trigger section 727(a)(4)(A), the false oath must relate to a material matter and must be made willfully with intent to defraud." Calder, 907 F.2d at 955; *accord* Gullickson v. Brown (In re Brown), 108 F.3d 1290, 1294 (10th Cir. 1997).

It is uncontested that the Debtor made false oaths regarding material matters in his bankruptcy case. The issue is whether the false oaths were made "knowingly" and "willfully with intent to defraud." 11 U.S.C. § 727(a)(4)(A); Brown, 108 F.3d at 1294; Calder, 907 F.2d at 955. In Calder, the Tenth Circuit stated:

> The problem in ascertaining whether a debtor acted with fraudulent intent is difficult because, ordinarily, the debtor will be the only person able to testify directly concerning his intent and he is unlikely to state that his intent was fraudulent. Therefore, fraudulent intent may be deduced from the facts and circumstances of the case. The bankruptcy court's ultimate determination concerning fraudulent intent will not be set aside unless clearly erroneous.

907 F.2d at 955-56 (citations omitted).

Applying the correct legal standard under section 727(a)(4)(A), the bankruptcy court concluded that the Debtor did not make the material false oaths willfully or with an intent to defraud. We may not reverse the bankruptcy court unless its conclusion is "clearly erroneous," especially in light of the fact that it was in the best position to assess the credibility of the witnesses and the facts and circumstances of the case. Fed. R. Bankr. P. 8013; Calder, 907 F.2d at 956; *accord* Brown, 108 F.3d at 1295; Holaday v. Seay (In re Seay), 215 B.R. 780, 791-92 (10th Cir. BAP 1997). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left

with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948), *cited in* Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985). Upon an independent review of the record, we do not have a "definite and firm conviction" that the bankruptcy court erred in refusing to deny the Debtor's discharge.

In so holding, we note that "those who seek shelter of the [B]ankruptcy [C]ode must provide '*complete*, truthful and reliable information.'" Calder, 907 F.2d at 956 (emphasis added) (quoting In re Tully, 818 F.2d 106, 110 (1st Cir. 1987)). A debtor's failure to disclose assets or prepetition transactions in bankruptcy pleadings based on his or her opinion that they are worthless or immaterial is not a valid defense under section 727(a)(4). Calder, 907 F.2d at 955. Furthermore, the trustee and creditors should not be expected to conduct an extensive investigation of the debtor's assets and transactions, but rather should be able to depend on the information provided in the debtor's bankruptcy pleadings. *See* id. at 956. The greater the number of assets or transactions that are not disclosed, the greater the inference of intent to defraud. Id.; *see* Brown, 108 F.3d at 1295. But, "[a] debtor will not be denied discharge if a false statement is due to mere mistake or inadvertence." Brown, 108 F.3d at 1294. "The fact that a debtor comes forward with omitted material of his own accord is strong evidence that there was no fraudulent intent in the omission." Id. at 1295.

From the record in this case, it is clear that there were numerous omissions in the Debtor's bankruptcy pleadings. Austin is justified in being irritated by the Debtor's "if not specifically asked, I need not tell" attitude. Nevertheless, it cannot be said that the bankruptcy court was clearly erroneous in finding that the Debtor did not act with an intent to defraud based on all of the facts and circumstances of the case. This is especially true given the undisputed fact that the omissions were disclosed early in the case, and based on the trustee's

testimony that the Debtor has been cooperative with him. *See* Brown, 108 F.3d at 1295.

The Debtor maintains that Austin has waived all issues on appeal because he did not file a Statement of Issues as required under Fed. R. Bank. P. 8006. The Debtor does not indicate what relief he seeks, but we find that the Debtor has waived this argument because he did not raise it prior to the submission of this case to the Court for disposition. Furthermore, even if the argument was not waived, the Debtor has not indicated in what way he was prejudiced by Austin's failure to file a Statement of Issues. Accordingly, any relief sought by the Debtor must be denied.

III. Conclusion

For the reasons stated above, the judgment of the bankruptcy court is AFFIRMED.